1988

Redevelopment Agency of Salt Lake City v. Juanita Irene Burge, Robert D. Barrows, Jr., Beatrice Irene Barrows, Ellen K. Daskalas, The Pawn Shop, James Anderson, Terry Pantelakis : Response to Petition for Rehearing

Utah Court of Appeals

Harold A. Hintze; Olsen, Hintze, Nelson, and Hill; B. Ray Zoll; William D. Oswald; Jerome H. Mooney; Kyle Treadway; Brant T. Wall; Wall and Wall; Attorneys for Respondent.
John T. Evans; Dart, Adamson & Kasting; Attorneys for Appellants.

IN THE UTAH COURT OF APPEALS

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88-0302

REDEVELOPMENT AGENCY OF SALT LAKE CITY, a public entity, Plaintiff, v. ELLEN K. DASKALAS, an individual d/b/a the Pawn Shop, a Utah corporation; and TERRY PANTELAKIS, an individual d/b/a Jewelers & Loans, Defendants and Appellants, and JUANITA IRENE BURGE; ROBERT D. BARROWS, JR.; BEATRICE IRENE BARROWS, et al., Defendants and Respondents.	Case No. 880302-CA
REDEVELOPMENT AGENCY OF SALT LAKE CITY, a public entity, Plaintiff and Respondent, v. JUANITA IRENE BURGE; ROBERT D. BARROWS, JR.; BEATRICE IRENE BARROWS, ELLEN K. DASKALAS, an individual d/b/a The Pawn Shop; THE PAWN SHOP, a Utah corporation; JAMES ANDERSON, an individual d/b/a Jim's Ribs; TERRY PANTELAKIS, an individual d/b/a Jewelers & Loans and Sales, Inc., a Utah corporation, Defendants and Appellants.	Case No. 880292-CA

ANSWER TO PETITION FOR REHEARING

AN APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, THE HONORABLE HOMER F. WILKINSON PRESIDING

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IN THE UTAH COURT OF APPEALS

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REDEVELOPMENT AGENCY OF SALT LAKE CITY, a public entity, Plaintiff, v. ELLEN K. DASKALAS, an individual d/b/a the Pawn Shop, a Utah corporation; and TERRY PANTELAKIS, an individual d/b/a Jewelers & Loans, Defendants and Appellants, and JUANITA IRENE BURGE; ROBERT D. BARROWS, JR.; BEATRICE IRENE BARROWS, et al., Defendants and Respondents.	Case No. 880302-CA
REDEVELOPMENT AGENCY OF SALT LAKE CITY, a public entity, Plaintiff and Respondent, v. JUANITA IRENE BURGE; ROBERT D. BARROWS, JR.; BEATRICE IRENE BARROWS, ELLEN K. DASKALAS, an individual d/b/a The Pawn Shop; THE PAWN SHOP, a Utah corporation; JAMES ANDERSON, an individual d/b/a Jim's Ribs; TERRY PANTELAKIS, an individual d/b/a Jewelers & Loans and Sales, Inc., a Utah corporation, Defendants and Appellants.	Case No. 880292-CA

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The Defendants/Respondents Juanita Irene Burge, Robert D. Barrows, Jr., and Beatrice Irene Barrows (hereinafter collectively referred to as the "owners"), by and through their attorney of record, John T. Evans, hereby answer the Petition for Rehearing of the Defendants/Appellants Ellen K. Daskalas, individually and dba The Pawn Shop, Terry Pantelakis individually and dba AAA Jewelers & Loans, Inc. (hereinafter collectively referred to as the "tenants"), dated November 9, 1989, on file herein, pursuant to request of the Court dated November 24, 1989.

POINT I

THE TENANTS HAVE NO COMPENSABLE RIGHT REGARDLESS OF WHEN THE "DATE OF TAKING" OCCURRED

Normally the date of service of Summons is the date fixed for valuing the property rights being acquired by condemnation. This is not a hard and fast rule, however, but only sets forth a presumption subject to change if it would result in an unfair or unjust award. The date of valuation has been determined to be seven and one-half years subsequent to the filing of the Summons as a result of delay in the proceedings. Utah State Road Commission v. Friberg, 687 P.2d 821 (Utah 1984). "Courts have also set valuation dates prior to the service of Summons when the value of condemned property not initially included in the area to be condemned has been diminished by the condemnation of nearby properties pursuant to the planned condemnation of a large area." Id. at 830.

Our Supreme Court has also held that the conduct of a party can amount to a waiver of their right to have damages assessed on the date of service of Summons. In Oregon S.L. & U.N.Ry. v. Mitchell, 7 Utah 505, 27 P.693 (1891), summons was served on a trustee in deed of trust, then later the fee owner entered an appearance and waived Summons. The owner argued that the date of valuation should be the date Summons issued against the trustee. The court held that the owners waived that right when they entered their appearance. The above cases are particularly instructive to the question as to the date of take and valuation. Where the tenants could have terminated immediately, but instead voluntarily chose to remain in possession under their original contract rents, thereby reaping the benefit of any bonus value during the remaining 13-month term without interruption, it would be unfair and unjust to hold that the date of valuation should still be the date of service of Summons as contended by the tenants. Their act of remaining in possession constituted a waiver by them of having their leasehold interest valued as of the date of service of summons. As long as they remain in possession, their interest in the real property remained undisturbed and unaffected by the condemnation action. The time of valuation would not be from the date of service of the Summons, but from the time when possession is taken, which in the instant case was not until after the lease had expired. Since there was no renewal of the lease and possession was retained by the tenants under the contract rents, they had no right to claim a bonus value whether as of the date of

service of Summons or otherwise. Gafney Press, Inc. v. State, (1954) 206 Misc 1070, 135 NYS 2d 512 (attached hereto as exhibit "A"). The opinion of this court that the time of taking is the time possession is taken is not contrary to the provisions of Section 78-34-11 Utah Code Ann. 1953 (as amended).

Phillips Petroleum Company v. Bradley, 205 Kan. 242, 468 P.2d 95 (1970), does not support the tenants' position that compensable leasehold rights were taken on the date of service of Summons because it appears that the right of possession is concurrent with the date of take. Tenants quote from the dissenting opinion to the effect that the tenants continued in possession for one and one-half months of their remaining 24 years after the taking date, but the majority opinion adopted the findings of the trial court to the effect that no interest remained in the property by anyone after the date of taking on March 9, 1966.

> The complete and entire right, title and interest of the plaintiff, lessee, and the landlords' entire estate in the leased premises were taken on March 9, 1966, and all their respective interests therein were extinguished.
>
> Id. at 98.

Phillips does confirm that "the right of the lessee to compensation, as any other right, may be waived . . ." (Id. at 98), which is certainly what the tenants did in the instant case when they elected to remain in possession for the remainder of their lease.

The whole basis for Phillips is that the tenants' right to compensation is fixed when the tenant no longer has a lease:

> It is the very general rule that the taking of an entire tract of land under lease by eminent domain abrogates the relation of landlord and tenant. Id. at 98.
>
> A valid taking of the whole premises, which divests the lessors title, terminates a lease. . . . Id. at 99.

In the instant case, there was no change in the landlord/tenant relationship which existed between the parties at the time Summons was served. This change only occurred after the lease expired by its terms and the tenants were occupying on a month-to-month basis. The reason the relationship continued is because under Utah law the filing of a condemnation action vests no rights in the condemnor until after it obtains an order of occupancy (Section 78-34-9) or obtains a final judgment of condemnation (Section 78-34-15). Since neither of these events occurred, the landlord/tenant relationship continued unrestricted, unlike the Phillips case where there was a taking that terminated the relationship. In the instant case, the tenants cannot claim they had a right to damages from the date of service of Summons when they knew that by staying in possession of the property they suffered no loss or damage.

Tenants argue that they had a right to an evidentiary hearing to determine the value of their bonus rights under the lease. The trial court did give the tenants a full evidentiary hearing on the issue of whether the tenants had any bonus rights and the trial court correctly found that the only right to compensation they would have would be for improvements, if any, they placed on the

property. Since the tenants remained in possession under the lease at contract rents for the remainder of the lease term and there was no renewal thereof, there was no reason to grant the tenants a hearing on the value of leasehold rights. They already received that value. The trial court did grant tenants the right to appear at trial and put on evidence concerning any improvements placed thereon by the tenants, but no evidence of any such improvements was ever forthcoming. The tenants simply failed to appear at the hearing on this issue, thereby waiving their rights to assert the same at this time.

Tenants cite Almota Farmers Elevator and Warehouse Company v. United States, 409 U.S. 470, 35 LEd 2d 1, 93 S. Ct. 791 (1973), in support of their argument that an evidentiary hearing "should have been accorded tenants to present evidence as to the fair market value of the existing leasehold interest." (Page 8 of Petition for Rehearing). In Almota, however, the hearing was held because a bonus value did exist which needed to be quantified. In the instant case, no bonus value existed. Contrary to tenants' assertion, there was no option to renew the lease in Almota, as clarified by the Court's statement that the issue of the case was:

> Whether, upon condemnation of a leasehold, a lessee with no right of renewal is entitled to receive as compensation the market value of its improvements without regard to the remaining term of its lease, because of the expectancy that the lease would have been renewed. (Emphasis added.) Id. 409 U.S. at 473

It is appropriate for this Court to determine in this case that the time of the taking is when the condemning authority

actually takes possession of the leasehold property, but whether it is determined that the date of valuation is when the Summons was served or when possession was taken from the tenants is not material because in either event the fact that the tenant remained in possession during the term of the lease at the contract rent indicates they have no bonus value to claim and no purpose would be served by holding a hearing for the purpose of quantifying the amount of such non-existent value.

POINT II

THE OWNERS HAVE A RIGHT TO BE AWARDED ATTORNEY'S FEES

Tenants assert that even though they did not prevail in their claim for a bonus value they should not be required to reimburse the owners for the expenses caused in defending against the tenants' claim, because such claims were "warranted" as shown by the Almota case. In Almota, the court allowed evidence of the possibility that a lease might be renewed, therefore, the tenants assert they also were justified in making a similar claim for bonus value due to the possibility of renewal. However, the claim asserted in Almota was not similar to the tenants' claim in the instant case. Almota allowed evidence of the possibility of a lease renewal to show the value of improvements placed on the property by the lessee. In the instant case, however, the tenants presented no evidence that they placed improvements on the property so the valuation of such improvements is not an issue.

In the instant case the only basis the tenants would have to make a claim for bonus value due to extension of a lease is if they had a right to extend at below market rents thereby creating a bonus value. Almota did not allow evidence of an extension for that purpose nor did the tenants have any valid claim due to a right to extend at below market rents because the lease provided that any extension would be granted only at newly renegotiated rents, and certainly such rents would reflect market conditions. So Almota does not stand for the proposition that the defendant could claim a bonus value arising out of a possible renegotiation out of a lease nor did the case involve any interpretation of an attorney's fee clause in the lease. The tenants' claim for a bonus value based on a possible renewal simply was without merit.

Even if the tenants felt they had a valid claim, if they do not prevail they must bear the burden of reimbursing the owners for their expenses under the attorney's fee clause of the lease. The tenants seem to want to apply some good faith test as a basis for any award against them for attorney's fees, but the lease makes no such allowance. Its intention is to reimburse the owners if they are required to incur expense as a result of conduct by the tenants contrary to the lease terms. Misguided intentions, however well meaning, are not defenses to their obligations under the attorney's fee provision.

The tenants are not being penalized for filing an Answer that protects their rights in the event they had a valid bonus value. That did not cause the owners to incur expenses. Expenses were

caused by the tenants' pursuit of an award for a non-existent bonus value and most of those expenses were incurred through litigation with the tenants occurring after the remaining 13 month lease period expired and tenants were in possession on a month-to-month basis.

The tenants were not just protecting any potential claims in filing a responsive pleading. They went further and asserted that as of the filing of the Answer, while still in possession of the property paying the contract rent, they had an immediate right to an amount greater than 100% of the approved appraisal deposit with the Court. Their assertion of the right to the money has continued from that point until the present filing of the Petition for Rehearing, notwithstanding that they were allowed to complete their lease term uninterrupted. This unfounded demand caused the freezing of the funds on deposit with the court and necessitated that the owners defend against such claims at a trial on the issue of whether the tenants held any bonus value, and expenses were incurred by the owners as a result and continue to be incurred by the owners.

None of the attorney's fees payable by the tenants under the terms of the lease were incurred in determining the <u>amount</u> to be awarded to the respective parties. The fees were incurred to defend against the tenants' claim that they had any <u>right</u> to share in the award of just compensation. The question is not whether the tenants have a right to <u>assert</u> their claim, the question is whether the owners have a right to be compensated when the tenants fail to

establish such claim asserted pursuant to the lease. The leasehold provisions do not require that any distinction be made as to whether the tenants' claims were asserted in good faith. The fact that the claims were denied does indicate that they were without merit and, therefore, subject to the attorney's fee provision of the lease.

POINT III

THERE SHOULD BE NO FURTHER TRIAL REQUIRED AS TO THE ISSUE OF ATTORNEY'S FEES AT THE TRIAL LEVEL

Under Section IV of the Opinion of the Court of Appeals, it appears that there is a misunderstanding that the amount of attorney's fees awarded at the trial level was based upon the submission of affidavits only and not based on a trial. As a result of this mistaken impression this court ordered that since the tenants contested the amount of fees they are entitled to a trial on that issue. The fact is that a trial already held on that issue and should not need to be duplicated.

An evidentiary hearing was held on May 28, 1987, at which time Mr. Wall had the opportunity to present evidence and conduct cross-examination pursuant to his request for a special setting for that purpose. At the time of the hearing, however, Mr. Wall decided to simply submit the matter on affidavit following his argument. It was at the conclusion of that hearing that the court awarded the sum of $9,000.00. These facts are set forth on pages 11-12 of the Brief of Respondent's Burge, Barrows & Barrows dated March 31, 1988, on file herein, containing the citations to the record on

appeal, and states in part as follows:

> Subsequent to the trial a hearing was held on March 25, 1987, to rule on various motions, including the amount of attorney's fees that should be awarded the owners. At that hearing, evidence was admitted as to the amount of time which had been incurred by the owners' attorney in connection with the tenants' claim, the necessity of incurring those hours and the reasonableness of the amount of the fees incurred. This evidence was set forth in the owners' Affidavit in Support of Attorney's Fees From Tenants [footnote] which was admitted into evidence by Stipulation of the parties, subject to Mr. Wall's right of cross-examination and without prejudice to his argument that attorney's fees should not be awarded [footnote]. At the hearing the Court authorized the owners to submit an additional Affidavit regarding attorney's fees and ruled that the tenants could have a further hearing on the matter to present evidence as to the issue of attorney's fees and to afford the tenants their right of cross-examination [footnote]. On April 6, 1987, the owners submitted their Supplemental Affidavit in Support of Attorney's Fees From Tenants primarily summarizing the "record" [footnote] following which Mr. Wall set the matter for evidentiary hearing to be held on May 28, 1987. At that time, Mr. Wall filed his Affidavit, [footnote] but no further evidence was introduced and no cross-examination of the tenants' attorney was sought. The matter was argued and submitted on the Affidavits. At the conclusion of that hearing, the Court awarded the sum of $9,000.00 attorney's fees to be paid by the tenants, as noted above, and inserted that amount as part of the Order and Judgment, which was then entered [footnote].

Inasmuch as a trial was held following submission of the Affidavits specifically at the request of tenants of which this Court was apparently not aware, at which the tenants were afforded the right of cross-examination and to put on other evidence, it is submitted that any additional trial as to the issue of the award

of $9,000.00 would be redundant and an unnecessary burden upon the trial court.

CONCLUSION

A just and fair award of compensation for a leasehold in which the tenants remained in possession would require a determination of value as of the date possession was actually taken rather than date of service of Summons, and by remaining in possession the tenants waived their right to have their leasehold valued as of service of Summons. It is not material whether the valuation of the leasehold interest was as of service of Summons or loss of possession because in either case the tenants lost no bonus value so there was nothing to vest on either date. Even if the tenants had a right to be compensated for the 13 months remaining under the lease term, it received the benefit of that right because they remained in possession under the contract rent thereby losing no bonus value and no extension of that lease occurred. Without a bonus value there is no reason for a hearing to determine amount other than the hearing concerning the value of improvements which the tenants were afforded but failed to attend or otherwise make a proffer.

The tenants have asserted and continue to assert claims and demands to share in the proceeds of the condemnation long after remaining in possession during the full term of the lease and it is for this action, not for the filing of the Answer, that the tenants are required to compensate the owners for the expenses they have incurred. The tenants are not being penalized for asserting

a valid claim, but for asserting a right to a bonus value during the same period they remained in possession and for an alleged five year extension to which they have no rights. Since tenants' claims were not valid, the Owners should be compensated for defending against them. Tenants are not being penalized for trying to show the amount of just compensation, but for having no right to just compensation whatsoever.

No further trial as to the award of $9,000.00 attorney's fees incurred at the trial level should be held and the Court of Appeals' decision ordering remand for that purpose should be modified and such award of $9,000.00 be affirmed.

Respectfully submitted this 8th day of December, 1989.

DART, ADAMSON & KASTING

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CERTIFICATE OF SERVICE

I hereby certify I caused four true and correct copies of the Respondent/Defendant's Answer to Petition for Rehearing to be mailed to the following counsel of record on the 8th day of December, 1989:

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practice as well as upon a course of conduct or other evidence which clearly demonstrates that there is no issue of substance to be tried.

We think the court at Special Term correctly granted judgment for plaintiff. Under the form of pleading asserted by the plaintiff and the factual theory set forth in its moving papers and upon which the judgment rests, the adjudication will not be deemed to prejudice a subsequent assertion by defendant of a right to recover under the terms of its contract upon showing its own due performance of the conditions undertaken; and such a right is conceded by plaintiff on the argument of the appeal.

The effect of the judgment presently entered, although on its face an absolute adjudication of rights between the parties, is that until proof has been adduced by defendant that the pounds have been delivered, plaintiff is entitled to the return of the dollars paid for the pounds.

The judgment and order appealed from should be affirmed with costs.

All concur.

Judgment and order unanimously affirmed with costs.

Order filed.

The GAFNEY PRESS, Inc., Claimant v. The STATE of New York.

Court of Claims of New York.

Dec. 2, 1954.

Action for damages for appropriation of leased premises by State. The claimant moved for order amending or vacating the judgment. The Court of Claims, Charles T. Major, J., held that claimant suffered no loss during period that it continued on premises after appropriation, paying same rent to State as it had paid under lease to lessor, and damages could only be computed from time of removal.

Motion denied.

1. Eminent Domain ⇐200

In action for appropriation of lessee's leasehold interest by State. claimant had obligation to show loss as basis for damages.

2. Eminent Domain ⇐147

Where leased premises are appropriated, lessee's damage is computed by ascertaining the value of the unexpired portion of the lease on the appropriation date, less reserved rent, plus the value of irremovable fixtures, equipment and other appurtenances.

EXHIBIT A

1. Eminent Domain ⇐147

Where, after appropriation of claimant
claimant was allowed to continue on for thr[illegible]ehold interest by State,
paying State same rent as paid under lease, [illegible]nths before removal,
during three months period, and damages were t[illegible]nt suffered no loss
of removal. [illegible]mputed from date

Hiscock, Cowie, Bruce, Lee & Mawhinney, Syra
Gerald Henley, Syracuse, of counsel. [illegible]or claimant,
Nathaniel L. Goldstein, Atty. Gen., Harold S. Coyne,
for the State. [illegible]ty. Gen.,

MAJOR, Judge.

This is a motion made on behalf of the claimant for an orde[illegible]
vacating the findings, conclusions and judgment, on the gr[illegible]ng
they contain an error and mistake in the computation of the pe[illegible]t
which claimant is entitled to damages.

The decision in the above entitled claim, which was filed on Septe[illegible]
1954, contained the following findings:

"10. There remained a balance of 48 months on said lease from t[illegible]
date of the appropriation to the date of termination thereof."

"15. The lease of the claimant had 45 months to run from the date
of removal on July 1, 1953 to the expiration of said lease on March 31,
1957."

"18. As a result of the appropriation herein by the State of New
York, the claimant was evicted from its leased premises and the value of
its lease which had 45 months to run was destroyed to its damage in the
sum of $6075 00."

It is the contention of the claimant that damages should be awarded
from the date of appropriation,—April 1, 1953, instead of July 1, 1953,
the date on which claimant vacated the premises.

[1] It is undisputed that, after the appropriation date, the claimant
made arrangements with the State of New York to continue in possession
of the leased premises and paid the agreed rental therefor until the date
of removal. Damage is based on loss, and it is claimant's obligation to
show such loss. Boston Chamber of Commerce v. Boston, 217 U.S. 189,
30 S.Ct. 459, 54 L.Ed. 725.

[2] The general rule is that the damage is computed by ascertaining
the value of the unexpired portion of the lease on the appropriation date,
less reserved rent, plus the value of irremovable fixtures, equipment and
other appurtenances. Schreiber v. Chicago & Evanston R. R. Co., 115
Ill. 340, 3 N.E. 427; Los Angeles County Flood Control District v. An-

drews, 52 Cal.App. 788, 205 P. 1085; Bernagozzi v. Mitchell Realty Co., Inc., 133 Misc. 594, 232 N.Y.S. 666; Bacorn v. People, 195 Misc. 917, 88 N.Y.S.2d 628.

In the Schreiber case [115 Ill. 340, 3 N.E. 430] above cited, the Court held:

> "It is not reasonable that a party should ask to be compensated for the loss of an unexpired term when, in fact, he has had the full enjoyment of his entire term * * *".

In Los Angeles County Flood Control District v. Andrews, supra, the Court commented in 52 Cal.App. on page 793, 205 P. on page 1087:

> "An anomalous and unbearable condition would be presented if, under that rule, the public could be required to pay for a leasehold interest not taken, but which the lessee held unmolested to the end of the term".

[3] For three months after the appropriation, an amicable arrangement existed herein between the State and the claimant, whereby the claimant continued to occupy the premises and pay the same rent to the State as paid to the original owner. Claimant suffered no loss for this period. The value of the unexpired term of claimant's lease on the date of the appropriation must be reduced by the value of the time which claimant occupied the premises pursuant to the new arrangement. Therefore, the damage should be computed from the date of claimant's removal. Schreiber v. Chicago & Evanston R. R. Co., supra; City of Cincinnati v. Schmidt, 14 Ohio App. 426; Los Angeles County Flood Control District v. Andrews, supra.

No reason existed requiring the State to counterclaim on this point. Under the arrangement, no rent remained to be paid.

Although the above cited cases do not apply to damages for a portion of the unexpired lease, they hold substantially that where the tenant occupied and enjoyed the premises during the balance of the term of the lease after the appropriation date, he would not be entitled to compensation for a leasehold interest not actually surrendered. The same logic should apply to a part-time occupancy by agreement.

The claimant, having made arrangements with the State of New York for the occupation of the leased premises, is entitled to damages from the date of removal.

The motion herein is denied.

Submit order accordingly.